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No. 00-____

IN THE

Supreme Court of the United States

THE CITIZENS BANK OF WESTON, INC.,
Petitioner,

v.

THE CITY OF WESTON,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether—as the court below held—proof of discriminatory purpose under *Washington* v. *Davis*, 426 U.S. 229 (1976), is required to establish that the imposition of a disproportionate tax burden violates the Fourteenth Amendment guarantee of equal protection, or whether—as the Second Circuit held in *Long Island Lighting Co.* v. *Town of Brookhaven, N.Y.*, 889 F.2d 428 (2d Cir. 1989)—no such proof is necessary.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner Citizens Bank of Weston, Inc. was the appellant and plaintiff below. Citizens Bank of Weston, Inc. is a wholly-owned subsidiary of Citizens Bancshares, Inc. The T. A. Whelan Trust owns more than 10% of the shares of Citizens Bancshares, Inc. Bennett D. Orvik, M.D., dba Primary Health Care Assoc., and the Sun Lumber Company were also appellants and plaintiffs below, but their interests are not implicated by the question raised in this petition. *See* App. 4a n.1.

Appellee, defendant below, and respondent in this Court is the City of Weston, West Virginia.

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THE CITIZENS BANK OF WESTON, INC.,
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THE CITY OF WESTON,
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Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

PETITION FOR A WRIT OF CERTIORARI

Citizens Bank of Weston, Inc. ("Citizens") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia is reported at 544 S.E.2d 72 and reproduced in the appendix hereto ("App.") at 1a. The opinion of the Circuit Court of Lewis County is unreported and reproduced at App. 15a. The order of the Supreme Court of Appeals denying rehearing is unreported and reproduced at App. 21a.

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered on February 14, 2001. App. 1a. On March 21, 2001, that court denied a timely filed petition for rehearing. App. 21a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1, cl. 4.

Section 8-13-5(a) of the West Virginia Code provides, in pertinent part:

> (a) Authorization to impose tax. – (1) Whenever any business activity or occupation, for which the state imposed its annual business and occupation or privilege tax under article thirteen [§ 11-13-1 et seq.], chapter eleven of this code, prior to July one, one thousand nine hundred eighty-seven, is engaged in or carried on within the corporate limits of any municipality, the governing body thereof shall have plenary power and authority, unless prohibited by the general law, to impose a similar business and occupation tax thereon for the use of the municipality.

Section 27-42 of the Weston City Code provides, in pertinent part:

> Upon every person engaging or continuing within the State in the business of banking or financial business, from and after July 1, 1971, the tax shall be equal to three-quarters of one percent (0.75%) of the gross income received from interest, premiums, discounts, dividends,

service fees or charges, commissions, fines, rents from real or tangible personal property, however denominated, royalties, charges for bookkeeping or data processing, receipts from check sales, charges or fees, and receipts from the sale of tangible personal property. Gross income shall not include:

(a) Interest received on the obligations of the United States, its agencies and instrumentalities;

(b) Interest received on the obligations of this or any other state, territory or possession of the United States, or any political subdivision of any of the foregoing or of the District of Columbia; or

(c) Interest received on investments or loans primarily secured by first mortgages or deeds of trust on residential property occupied by nontransients. However, all interest derived on activities exempt under subsection (c) hereof, shall be reported, as to amounts, on the return of a person taxable under the provisions of this section; and

(d) Such other exemptions as defined in West Virginia Code § 11-24-6(f)(1)(A) to (f)(1)(D).

INTRODUCTION

The City of Weston imposes a business and occupation tax ("B & O tax") on the privilege of doing business in the City. Banks are one of the classes of businesses subject to the Weston B & O tax. There are three banks in Weston—a local bank and two branches of large multi-branch banks. Although the B & O tax applies a uniform rate of 0.75% to the gross income received from certain banking activities on each of the three banks, the local bank pays a grossly unequal share of the tax in comparison to the two multi-branch banks, given the respective amount of banking business engaged in in Weston by each of the banks. This results from the fact

that the branch banks report income from certain banking activities otherwise subject to the B & O tax to their headquarters outside the City of Weston. Citizens, the local community bank, reports the income from such activities to Weston, which then subjects it to the B & O tax. The non-reporting by the multi-branch banks means that Citizens pays a largely disproportionate share of the Weston B & O tax, given the relative degree of banking business engaged in by the banks in Weston.

Citizens sued Weston on the ground that the B & O tax violated the Bank's right to equal protection under the Fourteenth Amendment to the United States Constitution. The Bank argued that it was in effect being subjected to taxes not imposed upon the other two members of its class in violation of the Equal Protection Clause. The West Virginia Supreme Court of Appeals, the state's highest court, rejected the Bank's claim. The court ruled that the claim was barred by this Court's decision in *Washington* v. *Davis*, 426 U.S. 229 (1979), which held that a neutral law does not violate the Equal Protection Clause as racially discriminatory simply because it has a disproportionate impact, in the absence of a purpose to discriminate on the basis of race. Since the Bank showed only a disparate impact and no invidious intent, the West Virginia court reasoned, its claim was precluded by *Davis*. *See* App. 11a.

In so ruling, the court rejected the holding of the trial court and the arguments of *both* petitioner and respondent in this case that this Court's decision in *Allegheny Pittsburgh Coal Co.* v. *County Commission of Webster County, W. Va.*, 488 U.S. 336 (1989)—holding that the Equal Protection Clause protects against state action that selects one member of a class for discriminatory treatment by subjecting it to taxes not imposed on others of the same class—was the applicable precedent.

The Second Circuit has rejected the analytical approach of the West Virginia Supreme Court of Appeals and specifically held that *Davis* does not apply to claims based on a discriminatory tax burden, and that such claims should instead by analyzed under *Allegheny Pittsburgh*. *See Long Island Lighting Co.* v. *Town of Brookhaven, N.Y.*, 889 F.2d 428, 432 (2d Cir. 1989). The West Virginia Supreme Court of Appeals opinion is a major departure from legal principles established by this Court, and has precipitated a sharp conflict with a federal circuit decision. This Court should grant the petition to resolve the conflict and to correct this startling misinterpretation of federal law.

STATEMENT OF THE CASE

1. The Discriminatory Taxation of the Local Bank. The state of West Virginia permits its municipalities to impose a B & O tax on activities within the city limits. *See* W. Va. Code § 8-13-5(a). In 1997, the City of Weston was seeking to raise "much needed-funds." App. 16a. For the first time in the City's history, Weston turned to a B & O tax to raise those funds; the tax became effective on July 1, 1998. *See* App. 5a. Banking is one of the classes of activities subject to the B & O tax. *See* App. 5a.

Under Section 27-42 of the Weston ordinance, banks and other financial institutions are taxed at a rate of 0.75% of the "gross income received from interest, premiums, discounts, dividends, service fees or charges, commissions, fines, rents from real or tangible personal property, however denominated, royalties, charges for bookkeeping or data processing, receipts from check sales, charges or fees, and receipts from the sale of tangible personal property."

There are three banks in Weston. Citizens Bank of Weston, the petitioner in this Court, is the only local bank. *See* App. 6a. The other two banks—United National Bank and

Huntington Bank—are large multi-branch banks with branches in Weston. *See* App. 11a n.13, 16a-17a. Citizens reports all of its income from its Weston banking activities in Weston. *See* App. 17a. The other two banks, however, report "income that would be subject to this local B & O tax at branches located outside of Weston." App. 11a. The net result is that Citizens is subjected to taxes that are not imposed on others of its class—the other two banks in Weston—for the same activities in Weston.

As Citizens explained, "while it has approximately fifty percent of the banking business in Weston it will be paying seventy percent of the B & O tax." App. 11a. United National Bank has approximately 35% of the banking business in Weston but will pay approximately 23% of the B & O tax. *See* Pls.' Br. at 12. Huntington Bank has approximately 13% of the banking business in Weston but will pay approximately 7% of the B & O tax. *See id.*

2. Circuit Court Proceedings. Citizens filed suit against the City in the Circuit Court of Lewis County, West Virginia, contending that the disproportionate impact of the Weston B & O tax violated the Equal Protection Clause of the Fourteenth Amendment to the federal constitution. *See* App. 15a.[1] The Bank argued that "the City of Weston's B & O Tax creates an unfair system of taxation that discriminates against local banks by requiring them to pay a disproportionate share of the total B & O taxes compared to their branch bank counterparts." App. 16a.

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[1] The Bank also challenged the B & O tax on state law grounds, including the Equal Protection Clause of the state constitution and the lack of similarity between Weston's tax and the state statute, section 8-13-5(a) of the West Virginia Code, authorizing municipalities to enact "similar" B & O taxes. *See* App. 15a-16a. The Circuit Court ruled in favor of the City on the state law grounds. *See* App. 18a-19a.

The court's analysis of the Bank's equal protection claim rested on *Allegheny Pittsburgh*. *See* App. 18a-19a. It began by citing *Allegheny Pittsburgh* for the proposition that " '[t]he Equal Protection Clause applies only to taxation which in fact bears unequally on persons or property of the same class.' " App. 18a (quoting *Allegheny Pittsburgh*, 488 U.S. at 343). It further reasoned that, under *Allegheny Pittsburgh*, the " 'fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated *relative to their property holdings*.' " App. 19a (quoting *Allegheny Pittsburgh*, 488 U.S. at 346) (emphasis added by Circuit Court). The Circuit Court held that "[t]he proper analysis according to *Allegheny* is to compare the 'relative property holdings' of the members of the banking classification." App. 19a.

Although acknowledging the Bank's showing that it held 50% of the banking deposits in the City but paid 70% of the overall B & O tax burden on the banking class of business, the Circuit Court nonetheless found that the City's B & O tax "treats those in the same class—in this case banks—exactly the same by taxing them at the same rate and on the same assets." App. 18a. The unequal taxation burden arose from the fact that the branch banks reported income otherwise subject to the B & O tax at other locations. App. 16a-17a. In light of this sheltering of comparable income from banking activities in Weston, the Circuit Court reasoned that Citizens simply "has more assets to tax." App. 18a. The Circuit Court rejected Citizens' argument, grounded on *Allegheny Pittsburgh*, that the formal equality of treatment between the banks was not controlling under the Equal Protection Clause when the tax was administered in such a manner as to in fact give rise to unequal treatment. *See, e.g.*, Pls.' Br. at 30-32; Pls.' Resp. Br. at 19-20.

Despite being "troubled by the continuing decline in small town businesses in favor of large out-of-state corporations, particularly in the banking industry," the court held as a matter of law that the Weston B & O tax did not violate the federal constitution. App. 16a, 19a.

3. The Decision of the West Virginia Supreme Court. Citizens appealed to the West Virginia Supreme Court of Appeals, arguing that the Circuit Court erred in finding that the Weston B & O tax did not violate the Equal Protection Clause. *See* App. 4a.[2]

The court rejected the Bank's equal protection claim based on five decisions from this Court, not one of which had even been cited by any of the parties below or the Circuit Court. The court relied most heavily on this Court's decision in *Washington* v. *Davis*, which held that a neutral law does not violate the Equal Protection Clause solely because it results in a racially disparate impact, but instead the disparate impact must be traced to a purpose to discriminate on the basis of race. *See* App. 11a-12a. It reasoned that "[i]n *Washington v. Davis*, 426 U.S. 229 (1976), the Supreme Court flatly refused to allow a disparate-impact analysis with regard to the equal protection clause." App. 11a-12a (citing *Davis*, 426 U.S. at 242). According to the West Virginia Supreme Court, the Bank's claim failed because it was based on the disparate impact of the B & O tax rather than any evidence of invidious purpose, and such a claim was barred by *Davis*.

The court also relied upon *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256 (1979), which upheld against an equal protection challenge based on gender discrimination a Massachusetts law that gave preference to

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[2] The Bank also appealed its state law claims. The court affirmed the Circuit Court on those claims, *see* App. 4a, 11a, 13a, 14a, and they are not at issue here.

veterans for civil service positions. *See* App. 12a (quoting *Feeney*, 442 U.S. at 273, as "acknowledging as 'settled [the] rule that the Fourteenth Amendment guarantees equal laws, not equal results' "). The court finally cited three opinions that did not speak for the Court in cases involving equal protection challenges brought by indigent defendants and inmates concerning asserted state obligations to provide transcripts, counsel, and law libraries. *See* App. 12a-13a (quoting *Douglas* v. *California*, 372 U.S. 353, 361-362 (1963) (Harlan, J., dissenting); *Griffin* v. *Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring); *Lewis* v. *Casey*, 518 U.S. 343, 375 (1996) (Thomas, J., concurring)).[3]

While relying on the above precedent from this Court involving racial and gender discrimination and the claims of criminal defendants, the court rejected the approach of the Circuit Court, and the arguments of both respondent and petitioner, that *Allegheny Pittsburgh*—a case, like this one, involving an equal protection challenge to local taxation—was the applicable precedent from this Court. *See* App. 13a. It found that *Allegheny Pittsburgh* "is inapposite authority as it concerned unequal property valuation and involved the separate constitutional provision found in article X, section 1, which requires uniform taxation according to a property's estimated value." App. 13a (referring to article X, section 1 of the West Virginia Constitution).

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[3] The court erroneously characterized a quotation from Justice Thomas's concurring opinion in *Lewis* as an "observ[ation]" by the Court. App. 12a-13a.

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW EXPRESSLY REJECTED THE DIRECTLY APPLICABLE PRECEDENT OF THIS COURT

The petition should be granted because the West Virginia Supreme Court of Appeals' decision conflicts with this Court's precedents governing equal protection challenges to taxation schemes. By departing from legal principles established by this Court, the court below misinterpreted federal law, precipitated a direct conflict with a decision from the Second Circuit, and sanctioned intentional and systematic discriminatory taxation.

The West Virginia Supreme Court of Appeals erroneously rejected the approach of the Circuit Court, and the arguments of both respondent and petitioner, that *Allegheny Pittsburgh* was the applicable precedent from this Court. *See* App. 13a. It found that *Allegheny Pittsburgh* "is inapposite authority as it concerned unequal property valuation and involved the separate constitutional provision found in article X, section 1, which requires uniform taxation according to a property's estimated value." App. 13a (referring to article X, section 1 of the West Virginia Constitution, which guarantees that, with certain exceptions, "taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value"). *Allegheny Pittsburgh* and the cases upon which it rested, however, establish this Court's analytical approach to equal protection challenges to taxation schemes.

Although they have "broad powers to impose and collect taxes," *Allegheny Pittsburgh*, 488 U.S. at 344, "the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment." *Allied Stores of Ohio, Inc.* v. *Bowers*, 358

U.S. 522, 526 (1959). Consistent with the Equal Protection Clause, a state may impose "different specific taxes upon different trades and professions." *Id.* at 527; *see also Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973); *Nashville C. & St. L. Ry.* v. *Browning*, 310 U.S. 362, 368 (1940). In each case, "[i]f the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law." *Brown-Forman Co.* v. *Kentucky*, 217 U.S. 563, 573 (1910).[4]

Entities of the same class, however, must be taxed equally: The " 'equal protection clause * * * protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.' " *Allegheny Pittsburgh*, 488 U.S. at 345 (quoting *Township of Hillsborough* v. *Cromwell*, 326 U.S. 620, 623 (1946)); *see also Williams* v. *Vermont*, 472 U.S. 14, 23-24 (1985) (holding that similarly situated taxpayers must be taxed equally). Equal protection analysis accordingly requires a comparison of the tax burdens of those in the same class. *See Allegheny Pittsburgh*, 488 U.S. at 345 ("[T]he fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings.").

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[4] Justice Stevens noted in *Nordlinger* v. *Hahn*, 505 U.S. 1 (1992): "But deference is not abdication and 'rational basis-scrutiny' is still scrutiny. Thus we have, on several recent occasions, invalidated tax schemes under such a standard of review. *See, e.g., Allegheny Pittsburgh* * * *; *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612, 618 (1985); *Williams* v. *Vermont*, 472 U.S. 14 (1985); *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869 (1985); *cf. Zobel* v. *Williams*, 457 U.S. 55, 60-61 (1982)." *Nordlinger*, 505 U.S. at 31 (Stevens, J., dissenting).

"[I]t must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property." *Sunday Lake Iron Co.* v. *Township of Wakefield*, 247 U.S. 350, 352-353 (1918); *accord Allegheny Pittsburgh*, 488 U.S. at 345; *Cumberland Coal Co.* v. *Board of Revision of Tax Assessments in Greene County, Pa.*, 284 U.S. 23, 28-29 (1931). Contrary to the governing assumption adopted by the court below, the "intentional" aspect of this prohibition does not require proof that the taxing authorities had a discriminatory purpose or evil motive:

> There is no question that the assessments under review were made pursuant to a deliberately adopted system. The case is not one of mere errors in judgment in following a proper method, but one where the challenged discrimination resulted from a plan of assessment which was none the less systematic and intentional because of belief in its validity. [*Cumberland Coal*, 284 U.S. at 25 (internal citations omitted).]

The intentional part of the analysis requires taxation "pursuant to a deliberately adopted system." *Id.* It does not require deliberate or purposeful discrimination of the sort considered in *Washington* v. *Davis*.

The undervaluation aspect of the prohibition can be established in a number of ways. In *Cumberland Coal*, this Court found a violation of the Equal Protection Clause where all coal in the same township was assessed at the same value an acre "notwithstanding differences in actual or market value due to distances from transportation facilities and to other factors." *Id.* at 26. In applying the intentional, systematic undervaluation principle, the disparate impact of the tax was crucial:

> [T]he fact that a uniform percentage of assigned values is used, cannot be regarded as important, if, in assigning the values to which the percentage is applied, a system is deliberately adopted which ignores differences in actual values so that property in the same class as that of the complaining taxpayer is valued at the same figure * * * as the property of other owners which has an actual value admittedly higher. *Applying the same ratio to the same assigned values, when the actual values differ, creates the same disparity in effect as applying a different ratio to actual values when the latter are the same.* [*Id.* at 29 (emphasis added).]

Thus, it is clear that an equal protection violation can occur when the tax disparately impacts taxpayers of the same class, even if the rate of taxation is uniform, and even in the absence of any invidious purpose.

This Court reaffirmed the vitality of these principles in *Allegheny Pittsburgh*, finding a constitutional violation where the rate of taxation was fixed at fifty percent of assessed value but the valuation of property differed vastly based on whether it had recently been sold. *See* 488 U.S. at 338, 346. There was no need to show discriminatory intent under *Davis*. It was enough that a deliberately adopted system had a demonstrably disparate impact on taxpayers of the same class.

The crux of the equal protection argument of Citizens is the same: the Weston B & O tax has a disparate impact on Citizens, the local bank, compared to the other two members of its class, the two multi-branch banks. *See* App. 16a-17a. The Weston B & O tax applies to certain activities conducted by the banks. *See* Weston City Code § 27-42. The unequal taxation results from the disparity in reporting of income from certain of those activities between the local bank and

the multi-branch banks. The deliberately adopted system that purports to tax certain activities but then allows some members of the class but not others to effectively avoid the taxes results in the disparate tax burden.

In "explanation of this point," Citizens provided evidence that "while it has approximately fifty percent of the banking business in Weston it will be paying seventy percent of the B & O tax." App. 11a. United National Bank has approximately 35% of the banking business in Weston but will pay approximately 23% of the B & O tax. *See* Pls.' Br. at 12. Huntington Bank has approximately 13% of the banking business in Weston but will pay approximately 7% of the B & O tax. *See id.*

As in *Cumberland Coal* and *Allegheny Pittsburgh*, the Weston B & O tax constitutes "intentional systematic undervaluation by state officials of other taxable property in the same class[,]" which "contravenes the constitutional right of one taxed upon the full value of his property." *Allegheny Pittsburgh*, 488 U.S. at 345; *Cumberland Coal*, 284 U.S. at 28. The Weston B & O tax violates the intentional aspect because it was made "pursuant to a deliberately adopted system." *Cumberland Coal*, 284 U.S. at 25. The Circuit Court found that the City of Weston adopted the B & O tax "after careful and considerate deliberation[,]" which included seeking the advice of the city attorney, state tax commissioner, and president of the municipal league, hiring a certified public accountant, and holding "several public meetings." App. 16a, 17a.

The Weston B & O tax also violates the undervaluation aspect of the equal protection analysis. While the rate of taxation is a uniform 0.75%, the taxable property of the branch banks is effectively undervalued while the taxable property of Citizens is taxed at its full value. *See Allegheny*

Pittsburgh, 488 U.S. at 345; *Cumberland Coal*, 284 U.S. at 28-29; *Sunday Lake Iron*, 247 U.S. at 352-353. The reporting of income that would be subject to this local B & O tax at branches located outside of Weston by the multi-branch banks results in the other member of the banking class, Citizens, bearing an unequal tax burden. This inequality is borne out by the comparison of banking business to B & O tax burden. Such a comparison makes sense, given that the tax in question, is, after all, a business and occupation tax.

More is at stake, however, in this case than an unjust result. In order to reject petitioner's equal protection challenge, the West Virginia Supreme Court of Appeals departed from the above legal principles established by this Court. The ourt rejected *Allegheny Pittsburgh*, and the cases upon which it rests, as "inapposite authority" and relied upon completely inapplicable precedent from this Court. App. 13a.

II. THE COURT BELOW EMBRACED WHOLLY INAPPLICABLE PRECEDENT OF THIS COURT

The West Virginia Supreme Court of Appeals declined to consider Citizens' analysis, holding that "[i]n framing its equal protection argument in terms of disparate impact on local banks as compared to branch banks, Citizens has crafted an argument that has been considered and rejected by the United States Supreme Court." App. 11a.

The court rejected the Bank's equal protection claim based on its view that *Washington* v. *Davis*, 426 U.S. 229 (1976), was the applicable precedent from this Court. *See* App. 11a-12a. The court reasoned that in *Davis* "the Supreme Court flatly refused to allow a disparate-impact analysis with regard to the equal protection clause." App. 11a-12a (citing *Davis*, 426 U.S. at 242). The court held that a violation of equal

protection requires proof of a "discriminatory purpose underlying the law's enactment." App. 14a.

Davis involved the validity of a qualifying test administered to applicants for positions as police officers in the District of Columbia Metropolitan Police Department. *See Davis*, 426 U.S. at 232. This Court held that a neutral law does not violate the Equal Protection Clause solely because it results in a racially disparate impact but instead the disparate impact must be traced to a purpose to discriminate on the basis of race. *See id.* at 239-240. The West Virginia Supreme Court of Appeals relied on this Court's rationale in *Davis* that "if it were to strike on equal protection grounds every law or regulation that benefits or burdens one classification more than another, every tax, welfare, public service, regulatory, and licensing statute that may be more burdensome to the poor or average black than to the more affluent white, innumerable laws could be determined unconstitutional." App. 12a (citing *Davis*, 426 U.S. at 248).

The court also relied upon *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256 (1979), which upheld against an equal protection challenge based on gender discrimination a Massachusetts law that gave preference to veterans for civil service positions. *See* App. 12a (quoting *Feeney*, 442 U.S. at 273, as "acknowledging as 'settled [the] rule that the Fourteenth Amendment guarantees equal laws, not equal results' "). The court finally cited Justice Thomas's concurring opinion in *Lewis* v. *Casey*, 518 U.S. 343 (1996), which clarified the boundaries of the requirement that states provide inmates with adequate law libraries. *See* App. 12a-13a (quoting *Lewis*, 518 U.S. at 375, as "observ[ing] that 'absent proof of discriminatory purpose, a law or official act

does not violate the Constitution solely because it has a * * * disproportionate impact' " (internal citations omitted)).[5]

The precedent on which the court below relied does not address equal protection challenges to taxation schemes. Instead, the cases concern questions rather far afield from the one at issue here—racial and gender discrimination, and the rights of indigent defendants and inmates to counsel and other resources necessary to pursue their claims. Neither of the parties even cited these cases; nor did the Circuit Court. And for good reason: this Court's cases that are far more directly on point—in that they actually concerned equal protection challenges to taxation schemes—make abundantly clear that the appropriate approach for analyzing equal protection challenges to taxation schemes does *not* require proof of a discriminatory purpose. Rather, the " 'equal protection clause * * * protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.' " *Allegheny Pittsburgh*, 488 U.S. at 345 (quoting *Township of Hillsborough*, 326 U.S. at 623). Citizens provided evidence of the banking business to B & O tax burden ratio to show that the B & O tax subjected the local bank to taxes not imposed on others of the same class—the two multi-branch banks. Its claim should have been considered on its merits—as the claim was in *Allegheny Pittsburgh*—rather than rejected out of hand for failure to meet a requirement not imposed by this Court's cases.

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[5] In footnote, the court also cited Justice Harlan's dissent in *Douglas* v. *California*, 372 U.S. at 361-362, and Justice Frankfurter's concurrence in *Griffin* v. *Illinois*, 351 U.S. at 23, for the propositions that reasonable classifications do not contravene equal protection and that a state need not equalize economic conditions. *See* App. 12a n.14 & n.15.

III. THE DECISION BELOW CONFLICTS WITH A DECISION OF THE SECOND CIRCUIT

The Second Circuit has expressly held that *Washington* v. *Davis* does not apply to equal protection analysis of taxation schemes. *See Long Island Lighting*, 889 F.2d at 432 (rejecting argument that proof of discriminatory purpose required to prove discriminatory taxation scheme). The Second Circuit held:

> While proof of an intent to discriminate has been required in other types of situations, *see, e.g.*, *Village of Arlington Heights* v. *Metropolitan Development Corp.*, 429 U.S. 252, 264-65 (1977) (housing discrimination); *Keyes* v. *School District No. 1*, 413 U.S. 189, 193 (1973) (school desegregation); *see also generally Washington* v. *Davis*, 426 U.S. 229, 239-43 (1976), in the context of real property tax assessments, evidence of the assessor's mental processes need not be proved. [*Id.*]

The Second Circuit further held, relying on *Allegheny Pittsburgh*, that "proof that the assessment method results in disparate treatment of similarly situated taxpayers is all that is required * * * to succeed in a * * * equal protection claim." *Id.* The Second Circuit decision directly conflicts with the decision of the West Virginia Supreme Court of Appeals in this case.

The West Virginia Supreme Court of Appeals opinion conflicts with this Court's decisions by rejecting directly applicable precedent and relying upon plainly inapplicable precedent. By misinterpreting federal law, the court below precipitated a conflict with a federal circuit court and sanctioned intentional and systematic discriminatory taxation of Citizens.

* * * *

The framework for considering equal protection challenges to the imposition of a disparate tax burden has been established by this Court for some time. As the Second Circuit explained in *Long Island Lighting*, that framework has never required a showing of discriminatory purpose, and accordingly has never necessitated any inquiry into the mental processes of tax officials. *See* 889 F.2d at 432. Now the highest court in West Virginia has established a new regime, one that requires proof of invidious purpose and thereby unavoidably necessitates probing the thought processes of the officials who enacted and administer the challenged tax. The Equal Protection Clause should mean the same thing in Wheeling as it does in Manhattan.

The West Virginia Supreme Court of Appeals based its ruling on two inapplicable opinions of this Court and three equally inapplicable minority opinions, while rejecting precedent directly on point. Its error is fundamental and palpable enough to warrant summary reversal and a remand for consideration of petitioner's constitutional challenge under the proper analytic framework.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

January 2001 Term

FILED

February 9, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 28458

RELEASED

February 14, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

THE CITIZENS BANK OF WESTON, INC.,
A WEST VIRGINIA CORPORATION,
BENNETT D. ORVIK, M.D.,
d/b/a PRIMARY HEALTH CARE ASSOC.,
AND THE SUN LUMBER COMPANY,
A WEST VIRGINIA CORPORATION,

Plaintiffs Below, Appellants,

v.

THE CITY OF WESTON, A WEST
VIRGINIA MUNICIPAL CORPORATION,

Defendant Below, Appellee

Appeal from the Circuit Court of Lewis County
Honorable Thomas H. Keadle, Judge
Case No. 99-C-25

AFFIRMED

Submitted: January 9, 2001

Filed: February 9, 2001

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JUSTICE ALBRIGHT delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

2. " ' "Where economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution, which is our equal protection clause." Syllabus Point 7, [as modified,] *Atchinson v. Erwin*, [172] W.Va. [8], 302 S.E.2d 78 (1983).' Syllabus Point 4, as modified, *Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, 174 W.Va. 538, 328 S.E.2d 144 (1984)." Syl. Pt. 4, *Gibson v. West Virginia Dep't of Highways*, 185 W.Va. 214, 406 S.E.2d 440 (1991).

3. "The rules for construing statutes also apply to the interpretation of municipal ordinances. There is generally a presumption that an ordinance is valid when it appears that its subject matter is within a municipality's power and it has been lawfully adopted. The burden of proof is on the person asserting that the ordinance is invalid." Syl. Pt. 1, *Town of Burnsville v. Kwik-Pik, Inc.*, 185 W.Va. 696, 408 S.E.2d 646 (1991).

4. In granting municipalities the authority to impose a "similar" business and occupation tax through the provisions of West Virginia Code § 8-13-5(a) (1998), the Legislature did not require that the tax imposed by municipalities be identical in rate and structure to the state business and occupation tax in effect prior to July 1, 1987.

5. " 'Section 1 of Article X of the West Virginia Constitution does not require that the same rate of business and occupation tax be applied to all classes of business activity and callings to which the tax is applied. The Legislature may prescribe different rates for different businesses and callings, but the rate of taxation must be uniform and equal within each classification.' Syllabus point 5, *Armco. Inc. v. Hardesty*, 172 W.Va. 67, 303 S.E.2d 706 (1983)." Syl. Pt. 1, *Town of Burnsville v. Cline*, 188 W.Va. 510, 425 S.E.2d 186 (1992).

6. The principles of equal protection are not invoked solely because a law, properly enacted, has a disproportionate impact. Without proof of a discriminatory purpose underlying the law's enactment, a disproportionate impact on one classification will not on its own create a violation of this state's equal protection provision. W.Va. Const. art. III, § 10.

Albright, Justice:

Citizens Bank ("Citizens") *et al.*[1] appeals from the February 24, 2000, order[2] of the Circuit Court of Lewis County upholding the Appellee City of Weston's recently enacted Business and Occupation Tax ("B & O tax"). The lower court rejected Appellant's argument that the Weston B & O tax violates the Equal Protection Clause of both the West Virginia Constitution and the United States Constitutions.[3] After fully examining the issues raised, we conclude that the lower court did not commit error and accordingly, affirm.

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1 Although two additional parties are named Appellants to this appeal, Bennett D. Orvik, M.D., and the Sun Lumber Company, we refer only to Citizens in the opinion because the equal protection violations that have been raised pertain uniquely to the banking industry.

2 *See infra* note 8.

3 *See* W.Va. Const. art. III, § 10; U.S. Const. amend. XIV.

I. Factual and Procedural Background

Effective July 1, 1998, the City of Weston ("City") amended its municipal code[4] to enact an ordinance permitting the assessment of a B & O tax against various city businesses. Under section 27-42 of the Weston ordinance, banking and other financial institutions are to be taxed at a rate of .75% of the "gross income received from interest, premiums, discounts, dividends, service fees or charges, commissions, fines, rents . . . royalties, charges for bookkeeping or data processing, receipts from check sales, charges or fees, and receipts from the sale of tangible personal property." The authority for levying a municipal B & O tax comes from West Virginia Code § 8-13-5(a) (1998), which provides that:

> (a) *Authorization to impose tax.*--(1) Whenever any business activity or occupation, for which the state imposed its annual business and occupation or privilege tax under article thirteen [§ 11-13-1 et seq.], chapter eleven of this code, prior to July one, one thousand nine hundred eighty-seven, is engaged in or carried on within the corporate limits of any municipality, the governing body thereof shall have plenary power and authority, unless prohibited by general law, to impose a **similar** business and occupation tax thereon for the use of the municipality.

W.Va. Code § 8-13-5(a) (emphasis supplied).

Citizens filed a declaratory judgment action with the circuit court, seeking to have the B & O tax declared unconstitutional on equal protection grounds. In support of its equal protection argument, Citizens asserted that: 1) the rate setting among the various business classes was performed in an arbitrary and capricious manner and lacked a rational basis; and (2) the B & O tax discriminates against

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[4] Article IV, entitled Business and Taxation Code, was amended to include Chapter 27 for the purpose of enacting a municipal B & O tax.

Citizens because a local bank such as Citizens will have to pay[5] a disproportionate share of the total tax compared to the branch banks (United National Bank and Huntington Bank) located in Weston.[6] After a bench trial on November 15, 1999, which included the testimony of several experts,[7] the circuit court upheld the ordinance in its ruling dated February 24, 2000, finding no basis for declaring the Weston B & O tax unconstitutional. Citizens filed motions based on Rules 59 and 52(a), seeking a new trial or, alternatively, an amendment of the findings and judgment of the lower court. By order entered March 22, 2000, the circuit court denied Citizens' motions for relief.

II. Standard of Review

Whether we view the February 22nd or the March 24th order as the order appealed from,[8] the appropriate standard of review is the same. We recognized in syllabus point one of *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995), that "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Our reviewing standard for denial of a new trial motion was articulated in *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 459 S.E.2d 374 (1995):

> We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of

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[5] We note that Citizens has not yet paid any B & O tax to the City of Weston.

[6] Citizens points out that the branch banks often transfer or keep their assets at other locations.

[7] Citizens presented testimony, over the objection of the City, from former State Tax Commissioner Charles O. Lorenson, and WVU College of Law tax professor Robert Lathrop.

[8] Citizens states in the docketing statement filed with this Court that it is appealing from the declaratory judgment order entered on February 22, 2000. Yet, in its petition for appeal, Citizens indicates that it is appealing from the March 24, 2000, order denying its new trial motion.

> reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Id. at 104, 459 S.E.2d at 381. Under either of these standards, a *de novo* standard of review applies to the issue of the constitutionality of the B & O tax ordinance.

III. Discussion

The level of scrutiny required to analyze equal protection challenges that involve economic rights was articulated in syllabus point four of *Gibson v. West Virginia Department of Highways*, 185 W.Va. 214, 406 S.E.2d 440 (1991):

> " 'Where economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution, which is our equal protection clause.' Syllabus Point 7, [as modified,] *Atchinson v. Erwin*, [172] W.Va. [8], 302 S.E.2d 78 (1983)." Syllabus Point 4, as modified, *Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, 174 W.Va. 538, 328 S.E.2d 144 (1984).

We stated in *Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 408 S.E.2d 634 (1991), that "classifications, including those which involve economic rights, are subjected to the least level of scrutiny, the traditional equal protection concept that the legislative classification will be upheld if it is reasonably related to the achievement of a legitimate state purpose." *Id.* at 691, 408 S.E.2d at 641. This is in accord with federal law, which similarly subjects equal protection challenges involving economic interests to the "rational relationship" test. *See San Antonio Indep. Sch. Dist. v.*

Rodriguez, 411 U.S. 1 (1973); *accord FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

In syllabus point one of *Town of Burnsville v. Kwik-Pik, Inc.*, 185 W.Va. 696, 408 S.E.2d 646 (1991), we held that:

> The rules for construing statutes also apply to the interpretation of municipal ordinances. There is generally a presumption that an ordinance is valid when it appears that its subject matter is within a municipality's power and it has been lawfully adopted. The burden of proof is on the person asserting that the ordinance is invalid.

Against these principles, we examine the equal protection arguments raised by Citizens.[9]

A. Rate-Setting and Rate-to-Class Structuring

Citizens contends that the Weston B & O tax should not be upheld because the rate setting among the various business classes was performed arbitrarily and capriciously and because the rate setting lacks a rational basis. At the center of this contention is Citizens' claim that the inclusion of the term "similar" in West Virginia Code § 8-13-5(a) requires any municipality that institutes a B & O tax to follow the exact same rate-setting and rate-to-class structure that was imposed by the state under its B & O tax system prior to its repeal on July 1, 1987.[10] Reasoning in a circular fashion,

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[9] The remaining two issues briefed by Citizens are not ripe for appeal as it is axiomatic that "[t]his Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." Syl. Pt. 2, *Sands v. Security Trust Co.*, 143 W. Va. 522, 102 S.E.2d 733 (1958). The other two issues included in the petition for appeal ((1) Citizens' introduction of expert witness testimony; and (2) the failure of the apportionment language in the municipal ordinance to effect parity between the local and branch banks) were never ruled upon by the circuit court. Accordingly, those issues are not ripe for appellate review purposes.

[10] *See* W.Va. Code §§ 11-13-2 (1985); 11-13-28 (1985); *see also* 1989 W.Va. Acts, 1st Ex. Sess., ch.2 (repealing many B & O

Citizens states: "The rate-to-class comparison with the State's pre-1987 B & O Tax is the crux of the test [sic] whether Weston's B & O Tax is *similar* to the State's pre-1987 B & O Tax as required by W.Va. Code § 8-13-5(a)."

Upon a review of the various statutory versions of both West Virginia Code §§ 11-13-1[11] (former statute authorizing state B & O tax) and 8-13-5,[12] we cannot reach the conclusion that the statutory term "similar" is in fact a requirement that any B & O tax enacted by a municipality must be identical with regard to rates and rate-to-class structure as the state B & O tax in effect prior to July 1, 1987. We find no basis for accepting Citizens' position that the insertion of the explanatory language referencing the pre-July 1, 1987, state B & O tax governs how municipalities structure their B & O taxes. The term "similar," as it is used in West Virginia Code § 8-13-5(a), does not refer to rates in effect at any given time. Instead, that term merely refers to the nature of the tax--a privilege tax on the exercise of certain businesses.

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tax provisions previously rendered "inoperative" as of July 1, 1987, under W.Va. Code § 11-13-28).

[11] *See* W.Va. Code § 11-13-1 (1933), (1955), (1959), (1967), (1971), (1972), (1989).

[12] An examination of West Virginia Code § 8-13-5(a) demonstrates that the term "similar" has been a part of West Virginia Code § 8-13-5 from its enactment in 1947. When West Virginia Code § 8-13-5 was first adopted, the statute provided that municipal entities could "impose a **similar** privilege tax for the use of the city, town or village" and contained the proscription that "in no case shall the rate of such municipal privilege tax on a particular activity exceed the rate imposed by the state, exclusive of surtaxes." W.Va. Code § 8-13-5 (eff. June 23, 1947) (emphasis supplied). When the state began phasing out the B & O tax in 1985, the Legislature amended West Virginia Code § 8-13-5 to allow municipalities to continue to impose a local B & O tax on "any business activity or occupation for which the state imposed its annual business and occupation or privilege tax . . . prior to" July 1, 1987. W. Va. Code § 8-13-5 (1985). Rather than referring to rates "similar" to those in effect pre-July 1, 1987, the term "similar" appears to refer to a similar kind of tax, i.e. a tax in the nature of a B & O tax.

Accordingly, we hold that in granting municipalities the authority to impose a "similar" B & O tax through the provisions of West Virginia Code § 8-13-5(a), the Legislature did not require that the tax imposed by municipalities be identical in rate and structure to the state B & O tax in effect prior to July 1, 1987.

This Court's decision in *Kwik-Pik* provides analogous support for our interpretation of the term "similar." Like Citizens, the defendant business in *Kwik-Pik* relied on the term "similar" in asserting that the Burnsville B & O ordinance was invalid because it lacked exemptions identical to those previously provided under the state B & O tax scheme and because the interest and penalty provisions did not parallel those of the former state B & O tax. This Court rejected both of these arguments, finding that the legislature did not insert those requirements in the language of West Virginia Code § 8-13-5 and that the term "similar" did not require municipal B & O taxes which mirrored the former state B & O tax. 185 W.Va. at 700-03, 408 S.E.2d at 650-53. Accordingly, the town of Burnsville was permitted to enforce its B & O tax ordinance, which varied both in structure and in rates from the state's B & O tax pre-repeal.

As a corollary to its argument that the rate-setting and rate-to-class structure must be identical to that imposed under the state B & O tax pre-July 1, 1987, Citizens maintains that only the Legislature has the authority to engage in rate-setting. While Citizens cites to *Lewis* as support for this proposition, that case does not indicate, directly or indirectly, that only the Legislature is authorized to set B & O tax rates. *See* 185 W.Va. at 690-92, 408 S.E.2d at 640-42. The language of West Virginia Code § 8-113-5 is clear in its delegation of legislative power: "the governing body thereof shall have plenary power and authority. . . to impose a similar business and occupation tax thereon for the use of the municipality." Moreover, given this Court's decision in *Baldwin v. City of Martinsburg*, 133 W.Va. 513, 56 S.E.2d 886 (1949), there is no question that the Legislative delegation of its taxing power to municipalities under West Virginia Code § 8-13-5

is constitutional. *See* Syl. Pt. 1, *Baldwin*, 133 W.Va. at 513, 56 S.E.2d at 887.

After fully examining this issue, we find no basis for error with regard to the lower court's determination that the rate-setting and rate-to-class structure of the Weston B & O tax do not violate state and federal equal protection provisions. We next examine the second prong of Citizens' equal protection argument.

B. Disproportionate Impact

Critical to understanding any equal protection claim is the recognition that " 'equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner.' " *Lewis*, 185 W.Va. at 691, 408 S.E.2d at 641 (quoting Syl. Pt. 2, in part, *Israel ex rel. Israel v. West Virginia Secondary Sch. Activities Comm'n*, 182 W.Va. 454, 388 S.E.2d 480 (1989)). In this case, the classification at issue is banking or financial institutions. Rather than claiming that the classification operates in an unconstitutional fashion, Citizens argues that Weston's B & O tax violates equal protection principles based upon its disproportionate impact on Citizens. In explanation of this point, Citizens asserts that while it has approximately fifty percent of the banking business in Weston it will be paying seventy percent of the B & O tax due to the fact that its competitors, United National Bank and Huntington Bank, avoid the full impact of this tax because those banks report income that would be subject to this local B & O tax at branches located outside of Weston.[13]

In framing its equal protection argument in terms of the disparate impact on local banks as compared to branch banks, Citizens has crafted an argument that has been considered and rejected by the United States Supreme Court. In *Washington v. Davis*, 426 U.S. 229 (1976), the Supreme

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[13] According to Citizens, United National Bank reports its income at Parkersburg and Huntington Bank reports its income at Columbus, Ohio.

Court flatly refused to allow a disparate-impact analysis with regard to the equal protection clause. *Id.* at 242.[14] The Court commented in *Davis* that if it were to strike on equal protection grounds every law or regulation that benefits or burdens one classification more than another, every tax, welfare, public service, regulatory, and licensing statute that may be more burdensome to the poor and to the average black than to the more affluent white, innumerable laws could be determined unconstitutional.[15] 426 U.S. at 248; *see also Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) (acknowledging as "settled [the] rule that the Fourteenth Amendment guarantees equal laws, not equal results"). The Supreme Court of the United States recently addressed this issue in *Lewis v. Casey*, 518 U.S. 343 (1996), and observed that: "absent proof of discriminatory purpose, a

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[14] Even before *Davis*, however, Justice Harlan recognized in his dissent to *Douglas v. California*, 372 U.S. 353 (1963), that under a disparate-impact theory regulatory measures always considered to be constitutionally valid, such as sales taxes, state university tuition, and criminal penalties, would have to be struck down. *Id.* at 361-62. Justice Harlan opined:

> Yet I take it that no one would dispute the constitutional power of the State to levy a uniform sales tax, to charge tuition at a state university, to fix rates for the purchase of water from a municipal corporation, to impose a standard fine for criminal violations, or to establish minimum bail for various categories of offenses. . . .
>
> Laws such as these do not deny equal protection to the less fortunate for one essential reason: the Equal Protection Clause does not impose on the States "an affirmative duty to lift the handicaps flowing from differences in economic circumstances."

372 U.S. at 361-62 (Harlan, J., dissenting) (quoting *Griffin v. Illinois*, 351 U.S. 12, 34 (1956)) (Harlan, J., dissenting).

[15] In this same vein, Justice Frankfurter observed in his concurrence to *Griffin*, that "the equal protection of the laws [does not] deny a State the right to make classifications in law when such classifications are rooted in reason," and that "a State need not equalize economic conditions." 351 U.S. at 21, 23.

law or official act does not violate the Constitution 'solely because it has a . . . disproportionate impact." *Id.* at 375 (Thomas, J., concurring) (quoting *Davis*, 426 U.S. at 239).

Citizens admits that it has not located even one case in which an equal protection violation has been found to exist based on a disproportionate impact analysis that is predicated on market share. When questioned by the circuit court for case support for its position, the only authority Citizens cited was *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336 (1989). That case is inapposite authority as it concerned unequal property valuation and involved the separate constitutional provision found in article X, section 1, which requires uniform taxation according to a property's estimated value.[16] The intentional systematic undervaluation that was found to be violative of equal protection principles in *Allegheny Pittsburgh* is clearly not present here.

This Court has previously applied article X, section 1 to the B & O taxation system and held in syllabus point one of *Town of Burnsville v. Cline*, 188 W.Va. 510, 425 S.E.2d 186 (1992), that

> "Section 1 of Article X of the West Virginia Constitution does not require that the same rate of business and occupation tax be applied to all classes of business activity and callings to which the tax is applied. The Legislature may prescribe different rates for different businesses and callings, but the rate of taxation must be uniform and equal within each classification." Syllabus point 5, *Armco, Inc. v. Hardesty*, 172 W.Va. 67, 303 S.E.2d 706 (1983).

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[16] In syllabus point two of *Capitol Cablevision v. Hardesty*, 168 W.Va. 631, 285 S.E.2d 412 (1981), we held that:

> The constitutional requirement of equal and uniform taxation means that as to classes of property, businesses, or incomes there shall be uniformity of taxation and a tax upon all businesses of the same class, which is uniform as to that class of business, is not unconstitutional.

The provisions of article X, section one are not implicated in this case as there is no contention that a uniform rate of taxation is not applied to all the banking institutions affected by the Weston B & O tax.

Upon review, we find no basis for Citizens' position that the Weston B & O tax violates both state and federal equal protection provisions. Like the United States Supreme Court, we hold that the principles of equal protection are not invoked solely because a law, properly enacted, has a disproportionate impact. Without proof of a discriminatory purpose underlying the law's enactment, a disproportionate impact on one classification will not on its own create a violation of this state's equal protection provision. *See* W.Va. Const. art. III, § 10.

Having found no state or federal equal protection violation inherent in the Weston B & O tax, we affirm the decision of the Circuit Court of Lewis County.

Affirmed.

APPENDIX B

IN THE CIRCUIT COURT OF LEWIS COUNTY, WEST VIRGINIA

THE CITIZENS BANK OF WESTON, INC.,
a West Virginia banking corporation,
BENNETT D. ORVIK, M.D.,
d/b/a Primary Health Care Associates, and
THE SUN LUMBER COMPANY,
a West Virginia corporation,

PLAINTIFFS,

v. CIVIL ACTION NO.: 99-C-25

THE CITY OF WESTON,
a West Virginia municipal corporation,

DEFENDANT.

ORDER FOR DECLARATORY JUDGMENT

On the 15th day of November, 1999, this matter was tried before the Court, without a jury. The Court has carefully considered the evidence presented by the parties, all exhibits of record, the arguments of counsel, pertinent legal authorities, and the briefs of the parties. Upon the findings of fact and legal authorities set forth below, the Court hereby finds that the City of Weston's Business and Occupation Tax is valid.

OPINION

The Plaintiffs allege the City of Weston's Business and Occupation Tax (B & O Tax) violates the Equal Protection Clause of both the State and Federal Constitutions in two respects. First, the plaintiffs allege the manner in which the City of Weston sets rates among the various business classes

is done in an arbitrary and capricious manner, lacking any rational basis and vary so widely from West Virginia Code §8-13-5(a) that they are invalid. Second, plaintiffs maintain the City of Weston's B & O Tax creates an unfair system of taxation that discriminates against local banks by requiring them to pay a disproportionate share of the total B & O taxes compared to their branch bank counterparts.

The City of Weston's B & O tax is undoubtedly an unpopular method for raising much-needed funds for the City of Weston. Furthermore, the Court is troubled by the continuing decline in small town businesses in favor of large out-of-state corporations, particularly in the banking industry. Nonetheless, this Court finds that the City of Weston's B & O tax is valid.

FINDINGS OF FACT

Upon the evidence presented, this Court finds that several public meetings were held in which many different business owners and other interested citizens participated in giving information to the Weston City Council. The City Council hired a certified public accountant, William Quinn, from the firm Meredith, Quinn, and Stinger, who was familiar with B & O taxes. Mr. Quinn created a pro forma designed to estimate income that could reasonably be raised by the City's B&O tax at the Council's request. The City Council sought the advise of the city attorney, the State Tax Commissioner, and the President of the Municipal League, all of whom advised there was no formula for deviation from the maximum rates that the city could follow. The city council considered the social, historic, economic, and geographic make-up of the community and developed the B&O tax according to those considerations.

While the various business categories are taxed differently from one another, within each class they are taxed the same. In particular, Section § 27-42 of the Weston's B & O tax taxes all banks located within the city of Weston at the same rate and on the same assets. However, the branch banks that have headquarters outside Weston report the assets from

certain mortgages where they are headquartered. Citizens Bank, on the other hand, reports the assets from their mortgages in Weston and thus are subject to the city's B & O tax. Furthermore, in addition to having their mortgage business subject to the B & O Tax, Citizens Bank has a large portion of their investment portfolio tied up in non-tax-exempt securities, that are also subject to the B & O tax, while the branch banks do not.

DISCUSSION

The West Virginia Supreme Court has clearly stated what is required to satisfy the Equal Protection Clause in economic matters such as these:

> Where economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution, which is our equal protection clause.

Syl. pt. 2, *Lewis v. Canaan Valley Resorts, Inc.*, 408 S.E.2d 634, 185 W.Va. 684 (W.Va. 1991); Syl. Pt 7, *Atchinson v. Erwin*, 172 W.Va. 8, 302 S.E.2d 78 (W. Va. 1983); Syl. Pt. 4, *Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, 174 W.Va. 538, 328 S.E.2d 144 (W.Va. 1984). Syl. pt. 4, *Gibson v. West Virginia Department of Highways*, 185 W.Va. 214, 406 S.E.2d 440 (W.Va. 1991).

The Court finds that the City of Weston's rate determination for the various classes of businesses was decided after careful and considerate deliberation and was decided upon a rational basis. The Weston City Council is vested with the authority to levy the B & O tax pursuant to West Virginia Code § 8-13-5(a)(1), so long as it is "similar" to the B & O tax set forth in the pre-July, 1987 *West Virginia Code § 11-13-1*, et seq. *West Virginia Code § 8-13-5(a)(2)*

provides that the City of Weston's B & O Tax shall not exceed those rates as set forth in the pre-July, 1987, *West Virginia Code § 11-13-1*, et seq.

This Court finds that the legislature, in its infinite wisdom, defined, in effect, what "similar" means by creating the municipal rate structure to provide only for a maximum level that municipalities cannot exceed. This court believes that as long as the various rates in the various classifications do not exceed the maximum rates as set forth in the pre-July, 1987, *West Virginia Code § 11-13-1*, et seq., they are valid. Therefore, this Court finds that the city of Weston's rate structure among the various classes does not violate the State or Federal Constitutions, nor *West Virginia Code §8-13-5(a)*.

"The Equal Protection Clause applies only to taxation which in fact bears unequally on persons or property of the same class." *Allegheny Pittsburgh Coal v. County Commission of Webster County*, 488 US 336, 343 (1989), citing *Charleston Federal Savings & Loan Association v. Alderson*, 324 US 182, 190 (1945). The City of Weston's B & O tax treats those in the same class -- in this case banks -- exactly the same by taxing them at the same rate and on the same assets. The difference between the branch banks and the local banks is the assets they hold. Simply put, Citizen's Bank has more assets to tax.

The Plaintiff's [sic] contend that compared to the market share they hold in the community they pay an unfair amount of the total B&O taxes. According to Plaintiff's Exhibit Three (3), Citizen's Bank holds 49.92% market share of the banking deposits in the City of Weston, and would pay 69.51% of the overall B & O Tax burden. This dramatic analysis compares apples to oranges. Section § 27-42 of Weston's B & O Tax does not assess the tax on the banking deposits, but assesses the tax upon other assets such as:

". . . [G]ross income received from interest, premiums, discounts, dividends, service fees or charges, commissions, fines, rents from real or tangible personal property, however denominated, royalties, charges for bookkeeping or data

processing, receipts from check sales, charges or fees, and receipts from the sale of tangible personal property." [Section § 27-42 goes on to specifically exclude several other items from B & O tax].

It is when the assets that are subject to the B & O tax are compared between the banks that the picture comes into the proper perspective. ". . . [T]he fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated *relative to their property holdings* (emphasis added)." *Allegheny Pittsburgh Coal v. County Commission of Webster County*, 488 US 336, 346 (1989). The proper analysis according to *Allegheny* is to compare the "relative property holdings" of the members of the banking classification. This comparison clearly reveals that local banks simply have more "property holdings" that are subject to the B & O tax.

CONCLUSIONS OF LAW

Based on the foregoing, the Court concludes as a matter of law that the City of Weston's Business and Occupation Tax is valid and violates neither the State or Federal Constitutions nor *West Virginia Code §8-13-5(a)*.

ORDER

It is therefore ORDERED that judgment be and the same is hereby rendered in favor of the defendant; that the Complaint of the plaintiff is dismissed with cost of these proceedings assessed against the plaintiffs.

The Circuit Clerk shall distribute certified copies of this Order to all counsel of record, and shall remove this action from the docket.

ENTER this Order the 24 day of February, 2000.

/s/

Thomas H. Keadle,
Chief Judge, 26th Circuit

APPENDIX C

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 21st day of March 2001, the following order was made and entered:

The Citizens Bank of Weston, Inc., a
West Virginia banking corporation,
Bennett D. Orvik, M. D., dba Primary
Health Care Assoc., and the Sun Lumber
Company, a West Virginia corporation,
Plaintiffs Below, Appellants

vs.) No. 28458

The City of Weston, a West Virginia
municipal corporation, Defendant
Below, Appellee

The Court, having maturely considered the petition for rehearing filed in the above-captioned proceeding on behalf of the appellants, The Citizens Bank of Weston, Inc., a West Virginia banking corporation, Bennett D. Orvik, M. D., dba Primary Health Care Assoc., and the Sun Lumber Company, a West Virginia corporation, by Weber & Weber, W. T. Weber, Jr., and W. T. Weber, III, their attorneys, is of opinion to and doth hereby refuse said petition for rehearing.

A True Copy

Attest: /s/

Clerk, Supreme Court of Appeals

Supreme Court, U.S.
FILED
JUN 9 2001
CLERK

No. 00-1876

In The

Supreme Court of the United States

THE CITIZENS BANK OF WESTON, INC.,

Petitioner,

v.

THE CITY OF WESTON,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Respondent is dissatisfied with the Petitioner's statement of the question presented. We believe it better stated thusly:

Is a hometown bank that reports all of its revenue from the banking activities that it does in the City of Weston deprived of equal protection of the laws by a facially non-discriminatory city tax on business revenue simply because other banks operating in the city are branches of large multi-city banks and these branches: (1) "ship out" of town to their home offices or other affiliates some of the banking business that originates within their Weston offices; (2) leave that business permanently to be handled by the offices elsewhere; and (3) thus do not pay the city tax on ensuing revenues from that business done elsewhere?

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STATE CASE

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STATEMENT OF THE CASE

The Respondent believes that this case is far simpler than portrayed in the Petition, and that a crisp understanding of the facts is crucial. At this juncture, we will talk more about the facts than the law.

1. **The Context.** This is a bout in the brawl between conventional hometown banking and modern branch banking.

2. **The Tax.** In 1997 Weston joined 148 other West Virginia cities by enacting a Business and Occupation ("B&O") tax, which is a tax on gross revenues from business done within the city limits. Much like a sales tax, B&O taxes have been used for many years by almost all West Virginia cities and towns because West Virginia law does not permit municipalities to impose local sales or income taxes.

Banking is one of the activities that may be taxed by municipalities under the state B&O tax enabling statute, and Weston's B&O tax does so. The Weston banking tax ordinance is absolutely facially neutral vis-à-vis hometown versus branch banks; it simply places a tax of 0.75% upon "the business of banking or financial business . . . " (The Weston banking tax ordinance appears in the bank's Petition at pp. 2-3.)

3. **Petitioner's Complaint.** While the bank acknowledges that Weston's tax is facially neutral, it alleges that it suffers a disparate impact as compared with the two other banks in town. The background is this:

Citizens Bank is a local bank. The other two banks operating in Weston (though they too began as local

banks) are now branches of large multi-city banking houses. It is admitted that some sorts of loans and investments that come into the branch banks are routed (described as "shipped out") to their home offices or affiliated companies, and subsequently remain there. The City cannot tax revenues from that business because it is done elsewhere; municipal B&O taxes can reach only business that occurs within the city limits.

4. **The Litigation.** When the B&O tax was enacted by the Common Council of Weston, Citizens Bank declined to pay it and instituted a declaratory judgment action alleging, *inter alia*, that the tax was violative of the Equal Protection Clause. This was true, Citizens said, because it retained and conducted all of its business originating within Weston within its Weston office, thus subjecting 100 percent of that business to the tax, while the branch banks shipped off some of the business that came their way from Weston, coincidentally removing that portion from Weston's tax jurisdiction. (Presumably, of course, it could be taxed by its new situs jurisdiction.) This left the branch banks paying B&O tax only on the business that they actually handled within their Weston offices. This, Citizens Bank alleged, was an unequal, unconstitutional tax impact.

It would seem that if anyone were to grumble about this scenario, it would be the City of Weston. One might expect the city to complain that it ought to be able to tax business that in some sense originates within it. But such is not the case before us today, because the city has no jurisdiction to tax business done elsewhere. At the moment, it is Citizens Bank lamenting that the other guys seem to be getting a better break!

Citizens Bank has not yet filed a B&O tax return, so its projections about its disproportional tax liability are but conjecture at the present. Even so, the learned trial judge concluded that, if Citizens Bank faced a potentially larger tax burden, it was not because of some constitutional infirmity in the B&O ordinance or its application, but because it simply was doing more banking business within Weston. "Simply put," he wrote, Citizens Bank has "more" to tax (p. 18a of the Petition). The West Virginia Supreme Court of Appeals, in a unanimous decision, agreed that Weston's B&O tax was valid under state and federal law.

ARGUMENT:
REASONS FOR DENYING THE WRIT

I. THERE IS NO GOVERNMENTAL ACTION.

If Citizens Bank does end up paying proportionately more B&O tax than the branch banks, it is simply the result of Citizens' own choices as to what sorts of business, and how much of it, to do within the city limits of Weston. No governmental action, either in the ordinance itself, or its application or administration, affects any disparity. Thus, the Equal Protection Clause is not implicated.

This is demonstrated by the plain fact that there is nothing whatsoever to prevent Citizens Bank from placing itself in *exactly the same posture* as the branch banks. Citizens could arrange to move the same sorts of business to affiliates in other cities, or open an office directly outside the Weston city limits, or use its existing branch

in a neighboring small town to avoid the Weston B&O tax. Citizens simply has chosen not to do so.[1]

II. THE CASE IS NOT "RIPE."

The West Virginia courts considered a mix of state law issues about B&O taxes as well as state and federal equal protection questions in adjudging this lawsuit below. There were two other plaintiffs in the case besides the bank; their issues involved state law issues. Now, stripped to Citizens Bank alone and its federal equal protection question, the case is not ripe for adjudication in the Supreme Court of the United States. And it would be rash to establish national tax policy upon such shifting sand.

It is the Respondent's position that the case is not ripe because Citizens Bank has never yet filed a B&O tax return with the City of Weston. It has refused to pay one cent of B&O tax. Accordingly, the city has no way of knowing what the bank's tax liability might be, or how its tax liability relates to that of the branch banks. The only evidence on this point presented in the West Virginia courts, for purposes of the Declaratory Judgment sought by Citizens Bank, was a set of self-serving estimates prepared by Citizens Bank. These estimates were formulated for this litigation by Citizens using its own, private figures and defining its own terms such as "banking

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[1] It is noted that Citizens Bank has a branch in the Town of Jane Lew, some five miles distant from Weston (transcript p. 127). Any business that Citizens elects to do there will not be taxable by Weston.

deposits" and "banking business." (See the bank's Petition at pp. 4, 6-7 in which Citizens asserts, according to its own estimate, that while it has about 50 percent of the banking business in Weston, it would be paying about 70 percent of the B&O tax on banking activities in the city.)

That this is acutely important is illustrated by the fact that in its Petition (p. 7) the bank explains that in the trial court this projected disparity was based upon the bank's showing that "it held 50% of the banking deposits in the City but paid 70% of the overall B&O tax burden on the banking class of business." Yet the B&O tax is *not a tax on deposits* or capital assets; it is strictly a tax on revenue! By its own words, then, the bank's projections compare apples against oranges.

In short, the facts have yet to be developed here. Once a return is filed, and a tax calculated, there may be no controversy here at all, or its parameters may be much different from those now perceived.

It is a venerable principle of our jurisprudence that courts are not to adjudicate upon conjectural facts, or to give prospective, advisory opinions based upon what *might* come to pass. There must be a real case and controversy; otherwise the matter is not "ripe" for adjudication. Nowhere is this more true than in establishing principles of constitutional law. This court has long declared that it will not rule upon a factual "hypothesis" or an "abstract question." *Liverpool, N. Y. & P. S. S. Co. v. Emigration Commissioners*, 113 U.S. 33, 39 (1885), or upon "speculation," *United Public Workers v. Mitchell*, 330 U.S. 75, 91

(1947). Neither will it "anticipate" a constitutional question in advance of the necessity of deciding it. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985).

The proper posture for litigation of this sort to be considered by the Supreme Court of the United States would be for the bank to file its return, have it evaluated by the city, and then – and only then – proceed to dispute the tax liability in the courts, based upon real world facts.

If the decision of the West Virginia Supreme Court of Appeals were to be reversed here, the implications for governmental taxation would be immense. The overworn aphorism about "Pandora's box" would be entirely apposite. Once Pandora decided to open the box, every sort of evil jumped out; only hope remained inside. Many local governments across America are like Weston today, beset by dreadful economic woes. They could be expected to face legions of lawsuits challenging local taxation by every business that faced a competitor with multiple business sites, and the spectre of "disparate impact" in local taxation would haunt mayors, aldermen and councils across the land. The implications for state and even federal taxation are myriad as well. Notwithstanding all other considerations, national tax policy should not be formulated through a case that is not in all respects fully ripe for judicial attention.

III. *WASHINGTON v. DAVIS* WAS APPROPRIATE.

One of the bank's assignments of error is that the West Virginia Supreme Court wrongfully relied upon *Washington v. Davis*, 426 U.S. 229 (1979) in formulating its decision. *Davis*, of course, held that disparate impact

alone, without proof of some sort of discriminatory purpose, could not establish an equal protection violation. It involved black police applicants who challenged certain types of tests for police positions on the ground that blacks did not score as well on the tests as other groups. The Court ruled against the black applicants because of the absence of any showing of discriminatory purpose. *Davis* should not have been utilized in the B&O tax case, the bank argues, because it did not involve taxation issues, but rather questions "far afield" from those involved here.

The West Virginia court's reference to *Davis* was appropriate. In doing so, the Court was saluting the principle that local government must have leeway in establishing local taxes. Under West Virginia law, a general presumption of validity accompanies a local tax ordinance, and the burden of proof is upon one who seeks to invalidate the tax. *Burnsville v. Kwik-Pic, Inc.*, 185 W.Va. 696, 408 S.E.2d 646 (1991). This principle has risen to the status of constitutional principle in the jurisprudence of this Court. In *New Orleans v. Dukes*, 472 U.S. 297 (1976) this Court said:

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations . . . In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . 772 U.S. at 303.

It is curious that the bank makes much of *Davis*. The courts below found absolutely nothing to suggest that the Weston Common Council had any discriminatory purpose in mind when it enacted the B&O tax. And, after all, *Davis* involved a claim of racial discrimination, one of the fundamental "suspect classifications" that is afforded the highest protection under equal protection law, and which requires "strict scrutiny" review. Taxation issues, however, are at the lower end of the equal protection spectrum. This Court repeatedly has stated that taxation and other economic issues are to be examined under the minimal "rational-basis" test. *Nordlinger v. Hahn*, 505 U.S. 1 (1992); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973). The Court recently declined to go beyond this "rational-basis" test by adopting more rigorous standards of scrutiny for general social and economic legislation. *Board of Trustees of the University of Alabama v. Garrett*, 121 S.Ct. 955 (2001).

IV. THE WEST VIRGINIA COURT PROPERLY INTERPRETED *ALLEGHENY-PITTSBURGH*.

The bank further argues that the West Virginia Supreme Court misunderstood the holding of this Court in *Allegheny-Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336 (1989). In that case, the Webster County, West Virginia, Assessor's practice of establishing assessments on recent purchase prices, while leaving assessments on neighboring properties at far lower values based on their purchase prices many years earlier, was found to violate the Equal Protection Clause.

The Court's ruling was based on a finding that the Assessor's practice was treating taxpayers *within the same class* differently. The Court went on to explain, however, that states were free to divide property into *different classes* and assign to each class a different tax rate, so long as the separations into different classifications are reasonable. Chief Justice Rehnquist stated:

> The States, of course, have broad powers to impose and collect taxes. A State may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable . . . It might, for example, decide to tax property held by corporations, including appellants, at a different rate than property held by individuals . . . (i)f the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, *there is no denial of the equal protection of the law.* (Emphasis added.) 488 U.S. at 344.

Citizens Bank and the branch banks are in the same class. Any disparity in the amount of B&O tax that each must pay is simply the result of its own actions and those of its customers. Citizens Bank is *free to choose what sorts of business* it wishes to conduct in the city, or to ship out of the city, or to decline altogether. Those choices, together with the volume of business that its customers bring to it, determine the amount of tax that it will owe. *No governmental action contributes to any difference in tax liability between or among the banks.*

Further, *Allegheny-Pittsburgh* involved disparate taxation of different tracts within one jurisdiction; our case

involves, on the one hand, business done in the jurisdiction versus, on the other hand, business done outside the jurisdiction, where the city has no power to tax.

V. *LONG ISLAND LIGHTING* DOES NOT CONFLICT

The bank also contends that the West Virginia Supreme Court's ruling conflicts with the Second Circuit's holding in *Long Island Lighting Company v. Town of Brookhaven*, 889 F.2d 428 (2nd Cir. 1989). However, the bank's brief grievously misinterprets the holding of that case.

The bank's Petition suggests that *Long Island* does away with any necessity of showing discriminatory purpose in order to establish an equal protection violation in tax assessment cases if the assessment method results in disparate treatment.

In fact, *Long Island* did *not* do away with the necessity of showing unlawful discriminatory intent. It simply distinguished *Washington v. Davis* as to how *proof* of intent is to be established. The case did state that in the context of real property assessments "evidence of the assessor's mental processes need not be proved." But the Court then went on to explain:

> The requisite unlawful intent follows from proof of a systematic overassessment over time of certain properties as compared to other similarly situated properties within the taxing district; indeed absent proof of such an inequitable impact of the assessor's methods, LILCO could not succeed on its equal protection claim. . . . Intentional discrimination also follows from evidence that the assessing authority repeatedly

applied greatly disparate assessment ratios to similarly situated properties in violation of state law. 889 F.2d at 432.

VI. ANYWAY, HOW COULD WE FIX IT?

That this is not an equal protection problem is demonstrated by the fact that it could not be "fixed," either by amending the tax ordinance or by changing some practice of the city government. The city certainly cannot, constitutionally, prohibit the branch banks from sending business elsewhere. The only way to eliminate the situation complained of by Citizens Bank would be to repeal the city tax on banking altogether, so long as there are branch banks in town. No matter how the ordinance might be rewritten, the city still would not be able to tax business done elsewhere.

VII. SUMMARY OF THE ARGUMENT.

This is a true story. I have a wonderful cousin. We are the same age, have the same education, hobbies, religion, the same number of children. We are both lawyers. Every April 15 we both write a check to the Internal Revenue Service. For years now his check has been in a much, much larger amount than mine. Why? I make my living primarily as a university professor and city attorney for a small city. He makes his as a very busy plaintiffs' lawyer. His choice, my choice. Is he denied equal protection of the laws because his tax bill is larger than mine? Of course not. He just does more taxable business.

So it is with Citizens Bank. If the bank chooses to perform more sorts of banking functions within the City

than do other banks, so be it. If the other banks choose to send some of their business elsewhere, so be it. Citizens Bank is free to do the same as a tax avoidance strategy. But Weston's B&O tax is applied equally and uniformly upon the only banking activity that it can tax – all that which occurs within the City.

CONCLUSION

For the foregoing reasons the writ should be denied and the judgment below affirmed.

Respectfully submitted,

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Supreme Court, U.S.
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THE CITIZENS BANK OF WESTON, INC.,
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v.

THE CITY OF WESTON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. The City begins its Opposition with an argument raised for the first time in this litigation—that the Equal Protection Clause does not apply because "there is no governmental action." Opp. 3. Of course there is. The City imposes the B&O tax and does so in a manner that is alleged to deprive Citizens Bank of equal protection. The fact that Citizens could avoid the City's tax by "open[ing] an office directly outside the Weston city limits," *id.*, is hardly responsive to the contention that the City is violating the Bank's constitutional rights. "If you don't like it, move" is always an available rejoinder to illegal government action, but has never before been considered an adequate legal defense.

2. The City next seeks to avoid consideration of the merits of the Bank's challenge by arguing that it is not ripe. The West Virginia Supreme Court of Appeals considered the record and status of the controversy between Citizens and the City sufficient to proceed to decide Citizens' constitutional claim. That claim is based on the fact that the City purports to levy a tax on engaging in the business and occupation of banking in Weston, but treats different banks engaged in the same activity—accepting deposits in Weston, issuing mortgages in Weston, and so on—differently depending on the happenstance of whether they report that Weston banking activity in Weston or elsewhere. The City of course asserts that its tax is constitutional, but does not suggest that the factual predicate for Citizens' claim is in any way unfounded. The nature of that claim will not be affected in any way by the further factual development contemplated by the City. That is why the West Virginia Supreme Court of Appeals proceeded to decide the question presented, and why this Court should do so as well.

3. The City purports to defend the proposition that the West Virginia Supreme Court's dispositive reliance on *Washington* v. *Davis*, 426 U.S. 229 (1979), "was appropriate," Opp. 6, but actually does something quite different. The City contends that in relying on *Davis*, the court below "was saluting the principle that local government must have leeway in establishing local taxes." *Id.* at 7. There is indeed such a principle, but *Davis* has nothing to do with it, and it is fully vindicated by proper application of the precedent *both* sides below and the Circuit Court agreed governed this case—not *Davis* but *Allegheny Pittsburgh Coal Co.* v. *County Comm'n of Webster County, W. Va.*, 488 U.S. 336 (1989). The City finds it "curious that the bank makes much of *Davis*," Opp. 8, but it was the West Virginia Supreme Court that did so, Pet. App. 11a-14a, even though neither

party so much as cited the case and it has nothing to do with local taxation.

The City's defense of the lower court's interpretation of the precedent that both sides had agreed was pertinent—*Allegheny Pittsburgh*—reduces again to nothing more than the cavalier assertion that Citizens can "ship out of the city" or "decline" to conduct banking business altogether. Opp. 9. Again, such retorts have not heretofore been recognized as valid defenses to claims of an equal protection violation.

4. *Long Island Lighting Co.* v. *Town of Brookhaven, N.Y.*, 889 F.2d 428 (2d Cir. 1989), is directly conflicting authority, and the City's response does nothing to mitigate the conflict. The City contends that *Long Island Lighting* "did *not* do away with the necessity of showing unlawful discriminatory intent." Opp. 10 (emphasis in original). This is what the Second Circuit held: "While proof of an intent to discriminate has been required in *other* types of situations," 889 F.2d at 432 (citing, *inter alia*, *Davis*) (emphasis added), "in the context of real property tax assessments, evidence of the assessor's mental processes need not be proved." *Id.* *Davis*, on which the court below relied, was thus clearly held to be inapplicable. If any doubt remained, the Second Circuit went on to explain that "proof that the assessment method results in *disparate treatment* of similarly situated taxpayers is all that is required * * * to succeed in a * * * equal protection claim." *Id.* (emphasis added). Indeed, even the language from *Long Island Lighting* quoted by the City makes clear that what is required is " 'proof of * * * *inequitable impact*,' " Opp. 10 (quoting 889 F.2d at 432) (emphasis added)—precisely the point rejected by the court below.

5. The City ends with an analogy to two taxpayers who pay different amounts of income tax because they have different incomes. Opp. 11. The analogy is, of course,

misplaced. Citizens Bank and the branch banks in Weston do not pay different B&O taxes because they engage in different amounts of banking business in Weston. The problem arises from the fact that although the branch banks engage in banking activities in Weston that are otherwise subject to the tax, they avoid it by reporting the activities elsewhere. Of two banks engaging in the same banking activity in Weston, one is taxed and the other is not. That disparate treatment should have been evaluated under *Allegheny Pittsburgh*. It was not, solely because the West Virginia Supreme Court—contrary to the Second Circuit in *Long Island Lighting*—thought *Davis* applied in such a case. This Court should grant certiorari to resolve this conflict on such a basic question of constitutional law.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition should be granted.

Respectfully submitted,

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